



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**CRIMINAL APPEAL 363 OF 2009**

**BETWEEN**

**JACOB KIRIMU KABIRU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a conviction and decree of the High Court of Kenya at Nyeri (Makhandia, J.) dated 16<sup>th</sup> December, 2009***

**in**

**H.C.CR.C. NO. 63 OF 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant **Jacob Kirimu Kabiru** appeared before us in person. On 28<sup>th</sup> December 2009 he filed in this Court a memorandum of appeal wherein he has raised only one ground of appeal, namely that the sentence of ten (10) years imposed on him by the superior court on 16<sup>th</sup> December 2009 following a plea bargaining agreement between the appellant and the State dated 10<sup>th</sup> December 2009 was excessive and should be reduced. Pursuant to the plea bargaining agreement the charge of murder was reduced to manslaughter on 11<sup>th</sup> December 2009. In the alternative the appellant pleads for a non custodial sentence.

The facts as set out in an Information dated 12<sup>th</sup> November 2008 were that the applicant on 24<sup>th</sup> October 2008 at Rianugaa village in Baricho Kirinyaga District within Central Produce murdered Francis Mwangi Martin. Further facts as admitted by the appellant in the formal plea bargaining agreement are that the appellant and the deceased were taking traditional liquor. A dispute arose between the deceased and the appellant over payment for the liquor and over the relationship between the appellant and the deceased's sister who was the appellant's former girlfriend whereupon a fight ensued. The appellant is said to have hit the deceased twice on the head resulting in his death at the venue of the attack.

The postmortem report on the deceased's body indicated that the cause of death was serious head injuries. Following the plea bargaining agreement accepted by the court as outlined above, the appellant was convicted by the superior court on his own plea of guilt and sentenced to ten years imprisonment.

In the appeal the State was represented by Mr. Kaigai Senior Principal State Counsel. The appellant's main contention as set out in his written submissions was that having pleaded guilty to the lesser charge of manslaughter and having saved the court's time and resources, he should have been given a non custodial sentence or the sentence of ten years be reduced to match the mitigating factors set out in his written submissions.

In this respect it is apt to reproduce what the appellant states by way of mitigation in his written submissions. In the material part he submits:-

***“.....I wish to add that I am deeply remorseful and repentant. This act was not premeditated, and the same nags my mind every waking hour. The deceased was my brother in law, from a family that I***

*greatly respect having given me a wife, the mother of my young family.*

*I very well know that its impossible to take Mwangi's position in life, but I feel that the least I could do is to help support his benefactors, and bring this wish to fruition. I do earnestly pray for leniency and if possible a non custodial sentence."*

On his part Mr. Kaigai submitted that the sentence was well merited taking into account that the appellant hit the appellant with an unidentified object in the head causing serious injuries which caused the death. We have considered the appellant's oral submissions together with his written submissions and have also considered the Principal State Counsel's submissions in support of the sentence.

This appeal arises from a plea bargaining agreement. In this regard it is clear to us that such a plea bargaining agreement must be considered in the light of **sections 137A to E** of the Criminal Procedure Code. Although the parties did not raise the point under **section 137L (1)** there is no right of appeal to this Court. The section provides:-

***"Subject to subsection (2) the sentence passed by a court under this part shall be final and no appeal shall lie therefrom except as to the extent or legality of sentence imposed."***

The effect of the above provision is that no appeal lies to this Court from the sentencing court which in this case was the superior court except on severity or legality of the sentence. We believe that the restricted right of appeal where a bargain has been struck is to assist in speeding up the process and to attain finality at the earliest time possible. However, we note that the superior court even after realizing that the plea was based on a plea bargaining agreement did not consider the mandatory provisions of **section 137 I (2)** of the Criminal Procedure Code and in particular, the need to take into account **a victim impact statement**. In our view, such **a victim impact statement** would have been necessary because the appellant in his written submissions as reproduced above has alluded to the possibility of assisting the dependants of the victim since he was a family member. The appellant in his submissions states that the victim was his brother in law and it is therefore possible that this factor could have resulted in a reduced sentence so as to avail the appellant an opportunity to assist the victims of the crime.

**Section 137 I** and **section 329 (c)** of the Criminal Procedure Code respectively state:-

***"137 I (1) Upon, conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.***

***(2) In passing a sentence, the court shall take into account-***

- (a) the period during which the accused person has been in custody;***
- (b) a victim impact statement, if any, made in accordance with section 329C;***
- (c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;***
- (d) the nature and amount of any restitution or compensation agreed to be made by the accused person.***

***(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."***

***"329C.(1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender."***

***(2) If the primary victim has died as a direct result of the offence, the court shall receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate."***

We are concerned that the superior court is not on record as having addressed the provisions of both **sections 137A to N** and **329 (c)** of the Criminal Procedure Code. Although **section 329 (c)** gives the court discretion to consider the appropriateness of a victim's impact statement, we think this factor which has a bearing on the severity of the sentence ought to have been considered. In the circumstances, since this was not done our inclination is to reduce the sentence by one year.

In the result we allow the appeal and order that the sentence be and is hereby reduced from ten (10) years to nine (9) years to run from 16<sup>th</sup> December 2009. It is so ordered.

***Dated and delivered at Nyeri this 4th day of November, 2010.***

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**